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IN THE

# Supreme Court of the United States

October Term, 1956.

No. 990

SOL GERSHENHORN and D. H. CAPLAN,

*Petitioners,*

vs.

WALTER R. STUTZ ENTERPRISES, a limited partnership, WALTER R. STUTZ and LOUIS STUTZ,

*Respondents.*

## Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada.

HERBERT JONES, of
JONES, WEINER & JONES,
230 South Fifth Street,
Las Vegas, Nevada,
*Counsel for Petitioners.*

ALVIN GERSHENHORN,
*Associate Counsel.*

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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*Respondents.*

## Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada.

*To the Honorable Earl Warren, Chief Justice, and the Honorable Associate Justices of the Supreme Court of the United States:*

Sol Gershenhorn and D. H. Caplow, petitioners herein, pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nevada, entered November 30, 1956, Petition for Rehearing denied January 29, 1957.

### Citations to Opinions Below.

The opinion of the Supreme Court of the State of Nevada is printed in Appendix B hereto, *infra*, p. 3, and is reported in 304 P. 2d 395. The opinion of the Supreme Court of the State of Nevada on the Petition for Rehearing is printed in Appendix B hereto, *infra*, p. 22, and is reported in 306 P. 2d 121.

## Jurisdiction.

The judgment of the Supreme Court of the State of Nevada was entered on November 30, 1956. The petition for rehearing was denied January 29, 1957. The jurisdiction of this Court is invoked under Title 28, Section 1257(3), United States Code.

On April 26, 1957, the Honorable Justice William O. Douglas, upon petition of Sol Gershenhorn and D. H. Caplow, entered an order granting petitioners herein, an extension of time, to and including May 14, 1957, within which, to file this petition for certiorari.

The Federal question was first raised after trial and Notice of Appeal had been filed in their Designation of Record on Appeal and the Points Upon Which Appellants Intend to Rely [Clk. Tr. on App. p. 276] reads as follows:

> "The Trial Court declared a forfeiture on certain agreements without affording defendants an opportunity to cure a purported default on each of the said agreements; thus confiscating certain personal property of defendants for the benefit of plaintiffs, and the Court thereby denied to said defendants due process of law and the equal protection of the law, affecting their substantial rights, in contravention of Article 14, of the Amendments to the Constitution of the United States of America.
>
> "The Trial Court confiscated a freehold for the benefit of plaintiffs, without giving the defendants the opportunity to cure a purported default; thus denying to said defendants due process of law and the equal protection of the law, affecting their substantial rights, in contravention of Article 14, of the Amendments to the Constitution of the United States of America."

It has been held that when review is sought in this Court affecting a State Court decision, pursuant to Title 28, Section 1257(3), United States Code, as in the instant case before the bar, providing for review the title, right, privilege or immunity under the Constitution and laws of the United States, such federal question may be set up at any stage of the litigation. Please see, *Doucette v. Vincent* (C. A. Mass., 1952), 194 F. 2d 834.

Petitioners again raised the Federal question on page 19, of their reply brief, as follows:

> "With respect to the notes in question, appellants believe they have aptly and adequately demonstrated that they were clearly taken by surprise when the judgment was handed down. The pleadings were not clear and during the entire trial no issue whatever was raised to the effect that plaintiffs claimed appellants had any notes whatever or that they desired cancellation of the notes, the property of other parties. In no sense were appellants apprised of this issue. This would then clearly be prejudicial to appellants affecting their substantial rights and in contravention of Article 14, of the Amendments to the Constitution of the United States of America, in that they were denied due process of law and the equal protection of the law, either one, or both. Appellants contend that they have the right to be apprised of the issues so as to be given an opportunity to be heard on the subject. Here, appellants were in no way apprised of this issue, and so were denied the opportunity to be heard. Appellants submit that a denial of one's constitutional rights is jurisdictional and may be raised for the first time on appeal if not otherwise raised during trial.
>
> "As has been demonstrated by appellants that they had no opportunity to raise this issue at the time of trial because they were not placed on notice, on this

issue, in any respect. Rule 8(a) N.R.C.P., reads as follows:

> 'A pleading which sets forth a claim for relief, whether an original claim, counterclaim cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.'

Indeed, it would appear that the pleadings of plaintiffs in the lower court did not follow this rule and consequently appellants were not on notice as to the issues to be raised or the relief to be demanded against them. Under this rule the function of the 'complaint' is to afford fair notice to the adversary of the nature and basis of the claim asserted and a general indication of the type of litigation involved. *Continental Collieries v. Shober,* 130 Fed. 2d 631."

The next time the Federal question was raised was in appellants' Petition for Rehearing before the Supreme Court of the State of Nevada. Here petitioners were completely taken by surprise. The question was created by an unexpected decision of the Supreme Court of the State of Nevada, and gave your petitioners no prior opportunity to anticipate or assert the particular federal question. See, *Brinkerhoff-Faris Trust Co. v. Hill,* 281 U. S. 673. This particular question involves Rule XI, of the Supreme Court of the State of Nevada, in effect July 1, 1954, which reads in part as follows:

> "Within fifteen days after the filing of the transcript on appeal in any case, the appellant shall file and serve his points and authorities or brief; and within fifteen days after the service of appellant's

points and authorities or brief, respondent shall file and serve his points and authorities or brief in reply; and within fifteen days thereafter appellant shall file and serve his points and authorities or brief in reply, after which the case may be argued orally. . . ."

The foregoing rule is followed by a footnote which reads:

"Errors assigned, but not briefed or orally argued, waived: Candler v. Ditch Co., 28 Nev. 164 (1905); Graff v. Shipman Bros., 67 Nev. 612 (1950)".

Under the said Rule XI, oral argument is limited to one hour, unless the Court grants permission for more time, and that particular portion reads as follows:

". . . Counsel shall not read from decisions nor argue more than one hour on each side without permission of the court."

The federal question on this point was raised on page 3, of appellants' Petition and Motion for Rehearing before the Supreme Court of the State of Nevada, and reads as follows:

"That Rule XI, of this Honorable Court, permits either the filing of a brief or in the alternative, points and authorities; that in submitting their opening brief appellants affected a combination of both, in that said brief contained both a Brief and omnibus points and authorities covering the various points of law involved with respect to the subject matter before this Honorable Court; and it appears that the Court did not take into consideration the points and authorities cited by appellants, although they supported the Points Upon Which Appellants Intend to Rely, theretofore filed, and were applicable to the law and facts involved in the instant case before the bar as to all material issues.

"Appellants attack Rule XI, of this Honorable Court, as violative of Article 14, of the Amendments to the Constitution of the United States of America, in that it is procedural in nature which arbitrarily affects the substantive law involved and does not afford full or ample opportunity to be heard because of the limitations set by this Court, thus denying litigants the right to be fully heard; thereby denying them their day in court, which results in denial of due process of law, affecting the substantial rights of litigants, in derogation of the aforementioned Amendment.

"By adhering to Rule XI, of this Honorable Court, in the instant case before the bar, this Honorable Court has denied appellants herein their day in court, their right to be fully heard, and thereby denied to said appellants due process of law affecting their substantial rights, in contravention of Article XIV, of the Amendments to the Constitution of the United States of America, for the following reasons:

"(a) In the cases of *Candler v. Ditch Co.*, 28 Nev. 164, and *Graff v. Shipman Bros.*, 67 Nev. (1950), this Honorable Court held that errors assigned, but not briefed nor *orally argued,* are waived. It is respectfully called to the Court's attention that some 25 cases were cited by appellants in their Opening Brief as Points and Authorities to support the Assignment of Errors designated as Points Upon Which Appellants Intend to Rely as part of their designation of Record on Appeal; and that the said Points Upon Which Appellants Intend to Rely, contain approximately 30 such Assignment of Errors. *The Rule of this Honorable Court is to the effect, that, counsel is permitted but One (1) Hour, for oral argument, regardless of the length of the record and the amount of Points and Authorities cited in his brief.* One cannot with equal force, fully and completely and

satisfactorily cover 30 Assignment of Errors in the same time taken to argue but 2 or 3, or even 5, 10, 15, 94 20 Assignment of Errors. Thus, one Counsel having far more Assignment of Errors to cover than his adversary is placed at a tremendous disadvantage. *Appellants submit, therefore, that no better or stronger argument could be advanced for this Court to expose certain manifest errors that 'lurk in the record'.*

"(b) At the argument of this case on the merits, the Rule of One (1) Hour, oral argument permitted each counsel, was enforced by this Honorable Court, and within the limits of the One Hour, counsel were also required to argue Respondents' Motion to Dismiss the Appeal, which consumed several precious minutes, which could have otherwise been utilized to cover several Assignments of Errors, but unable to do so because of the limits placed on counsel for appellants. These additional Assignment of Errors would then have been before the Court for consideration and could possibly have touched upon those manifest errors that 'lurk in the record'. This Court would not then have considered such Assignment of Errors to be deemed to have been waived.

"(c) Counsel for appellants moved the Court for additional time to argue orally, the case on the merits. The motion was denied by this Honorable Court.

"(d) Had the Respondents' Motion to Dismiss the Appeal been argued separately, each side would have been allowed a total of Two (2) Hours, for argument, to wit: One (1) Hour, for Respondents' Motion to Dismiss the Appeal * * * and *one (1) Hour, to argue the case on its merits.*

"(e) Therefore, in view of the Rule of this Honorable Court, the enforcement of this Rule by this Honorable Court although counsel were required to argue two matters within the limits set for one

matter, the denial of counsel for appellant's motion for additional time to argue the case on the merits, and in view of the former decisions of this Court, it becomes clearly manifest, that, those points not argued orally by counsel for appellants were deemed waived by this Court. Appellants submit that those particular points were not waived by them, charging of course, that they were compelled to abandon them by the strict enforcement of the aforementioned rule by this Honorable Court. Thus, if this Honorable Court deems these points to have been waived, it is done so over the objection of appellants, in that the circumstances surrounding counsels' position did not permit appellants to fully argue all of the Assignments of Errors previously raised.

"(f) Therefore, if all of the points raised, and not orally argued are deemed waived under the particular conditions and attendant circumstances all known and fully disclosed to this Court, and if permitted to argue such additional points whereby the Court might consider those points and adopt a contrary Opinion to the one now on file and of record, and in effect hold for appellants, it would, therefore, appear that the substantial rights of appellants herein have been materially and substantially affected under the Court's present holding, denying said appellants due process of law and the equal protection of the law in derogation of Article 14, of the Amendments to the Constitution of the United States of America."

The federal question was again raised in petitioners' Petition and Motion for Rehearing (p. 29) and reads as follows:

"Respondents postulated, and both the lower Court and this Honorable Court found, 'The lessees had not opened for business within six months after completion.' (op. p. 8) If this is now firmly established

and is part of the final judgment, as it must be, it clearly is res judicata and all parties cannot escape the consequences of the judgment and it should be strictly enforced. And, if this, be so, the courts have taken away valuable property rights belonging to appellants when their counter claim was summarily denied, *without the right to be heard*, and denied unto them due process of law and the equal protection of the law, affecting their substantial rights, in contravention of Article 14, of the Amendments to the Constitution of the United States of America. The parties to the agreements agreed as follows [R. 23:24 to 24-7]:

"'That if the business to be conducted shall not commence within six (6) months from completion of the building by lessor, this lease may be terminated at the option of lessor, *in which event, if lessor shall exercise the option to terminate this lease and said lease is terminated, lessor shall reimburse lessees for all costs paid in connection with the furnishing of furniture, fixtures, equipment, supplies and other material, also license application fees and other Governmental fees, deposits, bonds and bond premiums.*'

"Appellants submit, that respondents should not now be permitted to escape the consequences of this provision in the agreement."

The Supreme Court of the State of Nevada and the lower court wherein the case was tried have violated Article XIV, of the Amendments to the Constitution of the United States, affecting the substantial rights of petitioners herein.

The Supreme Court of the State of Nevada is the highest court of law or equity in the State of Nevada from which a final decision could be had in these matters herewith presented.

## Questions Presented.

I.

Where a case has been decided by the state supreme court in such a way that petitioners did not have a proper opportunity to be fully heard or present their evidence, have they been denied due process of law in contravention of Article XIV, of the Amendments to the Constitution of the United States of America?

II.

Where the trial court altered, reformed, and revised a written agreement between the parties has the injured litigant been denied due process of law in contravention of Article XIV, of the Amendments to the Constitution of the United States?

III.

Where a default on a leasehold has occurred, also affecting an option to purchase the real property involved, and the trial court refuses to permit the defaulting party an opportunity to cure the default, has such defaulting party been denied due process of law or the equal protection of the law, in violation of Article XIV, of the Amendments to the Constitution of the United States of America?

## Constitutional Provisions and Rule of Court Involved.

The Rule of Court involved is Rule XI, of the Supreme Court of the State of Nevada. It is printed in Appendix A, *infra,* pp. 1-2.

The constitutional provision involved is Article XIV, of the Amendments to the Constitution of the United States. It is printed in Appendix A, *infra,* p. 1.

**Statement.**

Respondents brought suit in the District Court of the State of Nevada, in and for the County of Clark, against petitioners herein, for breach of contract, termination and cancellation of the contract, and for breach of the lease contending non-payment of rent, pursuant to the terms of the agreement, for possession of the premises and for damages. [Clk. Tr. pp. 1-34.] Respondents contended that the building, the subject matter of the agreement was "duly completed" [Clk. Tr. p. 1].

Petitioners answered and denied that the building was "duly completed", as per the terms of the contract [Clk. Tr. pp. 42, 51]. Petitioner Caplow counterclaimed [Clk. Tr. p. 43]. The Trial Court found that the building was "substantially completed" [Clk. Tr. p. 251]. The Trial Court entered judgment for damages restored the premises to respondents, forfeited, terminated and cancelled the agreements [Clk. Tr. pp. 249-256].

On appeal the federal questions were raised as illustrated in the statement of "JURISDICTION", *supra*. A total of thirty assignments of errors were raised in appellants' points on which they intended to rely [Clk. Tr. pp. 275-281].

Respondents had filed a Motion to Dismiss the Appeal in the Supreme Court of the State of Nevada and was set down for argument on the very date that the appeal was heard on the merits. The Court ordered both matters to be argued at the same time. Rule XI, of the Supreme Court of the State of Nevada provides that either a brief or points and authorities may be submitted on appeal and if errors assigned and points urged are not included in the brief or *orally argued*, such errors and

points are waived. The said Rule further provides that Counsel is limited to one hour argument on appeal unless additional time is granted by the Court.

After arguing the motion to dismiss the appeal and during the course of the argument of the appeal on its merits, counsel for appellants in the Supreme Court of the State of Nevada, moved the Court for additional time to argue, urging that the record was so voluminous it would be impossible to fully argue the matter. The Court denied the motion and reminded counsel that the time limit was but one hour. On petition for rehearing counsel for appellants contended that this amounted to a denial of due process of law in derogation of Article XIV, of the Amendments to the Constitution of the United States of America.

The Supreme Court of the State of Nevada, nevertheless affirmed the judgment of the lower court and avoided the issues raised on the Constitutional questions urged before it. The limits placed upon counsel for appellants did not afford them a full opportunity to be heard or to argue and present the evidence as adduced in the lower court.

The Supreme Court of the State of Nevada recognized that reversible error was manifest in the record, when it stated in its opinion:

> "Other questions 'lurk in the record' which have caused the court some concern but which have not been properly presented for determination. . . .";

and the court then concluded on this issue by stating:

> "We do not choose, of our own motion, to add to the assignments of error issues which to us may seem of importance but which counsel have not seen fit to present."

It appears that the Supreme Court of the State of Nevada affirmed the judgment of the lower court on the hypothesis that the trial court did not revise, reform, modify or alter the existing agreements between the parties and in this respect affirming that the findings were sustained by the evidence.

**Reasons for Granting the Writ.**

The Supreme Court of the State of Nevada has decided a Federal Question of Substance in a way probably not in accord with applicable decisions of this Honorable Court.

Indeed, it would appear that Rule XI, of the Supreme Court of the State of Nevada is repugnant to the Constitution of the United States of America in that it denies due process of law and militates against a litigant wherein an extra large record is before the court rather than making provision to balance the scales of justice in such instances. While the said Rule does make provision that the court in its discretion may allot more time for argument, yet, where the record is voluminous and the assignments of error are far more than normal and where the court compels the argument of two matters within the one hour time limit set for oral argument of arguing a case on its merits and the court refuses to yield, maintaining a strict schedule, without affording a litigant the right to be fully heard and present all of the evidence in the case, such conduct of the Court compels a conclusion that the said rule is in derogation of Article 14, of the Amendments to the Constitution of the United States of America, in that it denies due process of law to a litigant. And, if under the circumstances the court knowing full well of the voluminous record refuses to yield and allow

a litigant to be fully heard it has abused its discretion and denied due process of law to a litigant in contravention of Article XIV, of the Amendments to the Constitution of the United States of America.

The guarantee of due process under the 14th Amendment extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government. See, *Kenney v. Fox,* 232 F. 2d 288; *Chicago etc. R. Co. v. Chicago, Ill.,* 17 S. Ct. 581, 166 U. S. 235, 41 L. Ed. 979.

The facts in the instant case before the bar show the record to be extra large and voluminous. The reporter's transcript has in excess of 600 pages, and the clerk's transcript has in excess of 400 pages with some 30 assignments of error to argue. Rule XI, of the Supreme Court of the State of Nevada compels the filing of a brief or points and authorities within 15 days after the record is lodged in that court. This could hardly be sufficient time to properly prepare an acceptable brief covering argument on each and every assignment of error. There remains but one alternative and that is to cite the points and authorities applicable to the issues involved. Counsel then has the right to expect that he will be given full and ample opportunity to be heard at the time of argument. He relies upon the administration of justice and the well settled law that he will be fully and completely heard.

However, Rule XI, of the Supreme Court of the State of Nevada makes it clear that, "errors assigned, but not briefed or orally argued, waived" (Rules of the Supreme Court, p. 16) citing *Graff v. Shipman Bros.,* 67 Nev. 612 (1950). Thus, where it is clear that the length of the record and the many assignment of errors command

longer argument to be fully heard, and this is denied, there is a violation of due process of law in contravention of Article XIV, of the Amendments to the Constitution of the United States of America. In the case of *Sauders v. Shaw,* 37 S. Ct. 638, 244 U. S. 317, 61 L. Ed. 1163, it was held by this Honorable Court, that: *where a case has been decided by the state supreme court in such a way that a party has not had a proper opportunity to present his evidence, he has been denied due process of law.*

It has been said many times that litigation is a luxury and it is not every person who can afford to spend thousands of dollars for appeals. Many judges have often expressed the remark, that a bad settlement is better than the best law suit, that they do all in their power and so should every one else to avoid being a litigant. Heavy litigation is more than a luxury; it is burdensome and expensive. The least that ought to be done is afford each and every litigant an opportunity to be fully heard, especially in a court of last resort, the Supreme Court of a sister state. Here a litigant looks to justice; here his last vestige of hope is placed that he will be fully heard and secure an impartial administration of justice. Here he hopes and even prays that a wrong will be righted and here he wants only one thing: that is to be given full opportunity to present his case in the best way he knows how, but he does expect that the court will give him every opportunity and assist him in correcting a wrong if such error exist or an injustice is manifest.

What then for, example, and what a chance has a poor litigant who cannot be fully and completely heard? What of the litigant who is in court *in forma pauperis*? Shall he be denied his day in court or the right to be heard because of a rule that will not permit enough time to

argue his cause; or for the other reason that the court will arbitrarily enforce the rule so rigidly that he will not be fully heard? Petitioners think not and for this reason urge upon this Honorable Court that Rule XI, of the Supreme Court of the State of Nevada be struck down as being repugnant to the Constitution of the United States of America. Firm guide posts must be established with reference to this Rule so as to afford a litigant the right to be fully and completely heard in the highest state court. Certainly, if a lower court were to arbitrarily set the length of a trial, the supreme court of that very state would reverse on the ground that the litigant has been denied due process of law in contravention of Article XIV, of the Amendments to the Constitution of the United States.

Indeed, petitioners were taken by surprise in the Supreme Court of the State of Nevada. Petitioners relied upon Rule XI, and upon the authority of *Graff v. Shipman Bros., supra*, in that they assigned their errors, filed their points and authorities and chose to fully argue each and every assignment of error on appeal. They had the right to expect to be fully heard on these issues. Petitioners could not conceive that the Court would compel the argument of two matters within the space normally allotted for one. Had the matters been argued separately certainly the time consumed would be in excess of one hour. Moreover, it is hard to conceive how the case on its merits, covering the record and all of the assignment of errors and points and authorities involved, could even be argued within the space of one hour. There were in excess of 100 exhibits before the court. Many of them were pictures illustrating that the structure in question was not completed and ready for occupancy. Counsel for

appellants did not have an opportunity to discuss even a fraction of these exhibits.

A grave injustice manifested itself by the decision of the Supreme Court of the State of Nevada. The court stated:

> *"Other questions 'lurk in the record' which have caused the court some concern but which have not been properly presented for determination. . . ."* * * * . . . *"We do not choose, of our own motion, to add to the assignments of error issues which to us may seem of importance but which counsel have not seen fit to present."* (Italics supplied.)

Petitioners submit that it was the duty of the court to expose these errors to the end that complete justice would be done. This should have been especially so for the reason that appellants were not fully and completely heard and were denied due process of law. The court does not say that these issues were not raised in the points and authorities submitted by appellants. And, even assuming so, that such errors were not touched upon by appellants in their points and authorities, there is much precedent where the court exposes such errors and reverses, to the end that justice is done. In the case of *Terminiello v. City of Chicago,* 69 S. Ct. 894, 898, the Honorable Mr. Justice Frankfurter, stated as follows:

> "For the first time in the course of the 130 years in which State prosecutions have come here for review, this court is today reversing a sentence imposed by a State court on *a ground that was urged neither here nor below,* and that it was explicitly disclaimed on behalf of the petitioner at the bar of this Court." (Italics supplied.)

However, there is nothing in the opinion of the court stating whether such errors were touched upon by appellants in citing their points and authorities. On this subject we are completely in the dark. One thing is certain, however, that the fault does not lie with petitioners. It must be laid at the door of the Supreme Court of the State of Nevada. *Had the court given appellants an opportunity to be fully heard the question might never have arisen. It must be assumed therefore, that, appellants did touch upon these errors in citing their points and authorities, but because of the limits placed upon them in arguing their cause, they were unable to present these errors orally to the court. Thus, the court treated them as waived and refused to bring them up on its own motion. The effect of which, was to deny petitioners due process of law in contravention of Article XIV, of the Amendments to the Constitution of the United States of America.*

Settlement of this question in particular is plainly in the public interest since it is likely to be presented many times where there is a lengthy and voluminous record and many assignments of error wherein the one hour rule to argue or present evidence will hardly be sufficient and as a result a denial of due process of law will manifest itself.

Petitioners further contend that they have been denied due process of law in contravention of Article XIV, of the Amendments to the Constitution of the United States, (a) when the court declared a forfeiture, termination and cancellation of an agreement and leasehold and did not give them an opportunity to cure a purported default so as to save their investment; and (b) when the court altered, varied, revised and reformed a written agreement between the parties. By this conduct of the court, it is

urged by petitioners, that the State of Nevada impaired the obligations of a written agreement between private parties. In 6 *Cal. Jur.*, Sec. 192, pp. 326-327, it is stated:

> "Courts enforce contracts as made, unless good morals or public policy are contravened. They cannot create a new contract, nor can they permit the parties themselves to do so without the consent of all, upon any theory that the original contract was not the most beneficial or advantageous, or that the enterprise contemplated by its terms cannot be successfully operated under it. Courts are not permitted to insert words not used by the parties themselves. To do so, it has been said, would be to make contracts, not to read them. Nor can terms not a part of a contract be read into it, and the Court cannot say that anything is immaterial which the parties have made material."

Equity abhors forfeitures and wherever possible will relieve the defaulting party. For example, *Section 3275 of the Civil Code of California,* reads as follows:

> "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of grossly negligent, willful, or fraudulent breach of duty."

The following authorities support this view:

*Hopkins v. Woodward,* 15 P. 2d 499, 500;
22 *Cal. Jur.* 2d, Sec. 21, p. 518;
*People v. Center,* 66 Cal. 551, 5 Pac. 263;
*Ballard v. MacCallum,* 15 Cal. 2d 439;
*Keller v. Lewis,* 53 Cal. 113;
*McCue v. Bradbury,* 149 Cal. 108, 84 Pac. 993.

## Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JONES, WEINER & JONES,
HERBERT JONES,
*Counsel for Petitioners.*

ALVIN GERSHENSON,
*Associate Counsel.*

Dated: May 10, 1957.

## APPENDIX A.

Article XIV, of the Amendments to the Constitution of the United States, which reads as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

## RULE XI.

**1. Time for Appellant to Serve Brief—Respondent.**

Within fifteen days after the filing of the transcript on appeal in any case, the appellant shall file and serve his points and authorities or brief; and within fifteen days after the service of appellant's points and authorities or brief, respondent shall file and serve his points and authorities or brief; and within fifteen days thereafter, appellant shall file and serve his points and authorities or brief in reply, after which the case may be argued orally. A brief must designate the page and line, or the folio, in the record where the evidence or matter referred to may be found, and in case of failure to do so the court may ignore the point made. *As amended April 20, 1940.*

For failure to comply with the above rule, judgment may be affirmed: Goodhue v. Shedd, 17 Nev. 140 (1882); Gardner v. Pacific Power Co., 40 Nev. 343 (1917). But see: Smith v. Wells, 29 Nev. 415 (1907); Adams v. Rogers, 31 Nev. 161 (1909).

Errors assigned, but not briefed or orally argued, waived: Candler v. Ditch Co., 28 Nev. 164 (1905); Graff v. Shipman Bros., 67 Nev. 612 (1950).

Failure of respondent to file brief, see: Padilla v. Mason, 53 Nev. 226 (1931); Hartford Mng. Co. v. Home Lumber & Coal Co., 61 Nev. 1 (1940); Hotels El Rancho v. Pray, 64 Nev. 25 (1947).

**2. What Points and Authorities to Contain.**

The points and authorities shall contain such brief statement of the facts as may be necessary to explain the points made.

**3. Oral Argument.**

The oral argument may, in the discretion of the court, be limited to the printed or typewritten points and authorities or briefs filed, and a failure by either party to file points and authorities or briefs under the provisions of this rule and within the time herein provided, shall be deemed a waiver by such party of the right to orally argue the case, and such party shall not recover cost for printing or typewriting any brief or points and authorities in the case. Counsel shall not read from decisions nor argue more than one hour on each side without permission of the court.

**4. Counsel Limited in Oral Argument.**

No more than two counsel on a side will be heard upon the oral argument, except by special permission of the court, but each defendant who has appeared separately in the court below may be heard through his own counsel.

**5. Optional in Criminal Cases.**

In criminal cases it is left optional with counsel either to file written, printed, or typewritten points and authorities or briefs.

**6. When Submitted.**

When the oral argument is concluded, the case shall be submitted for the decision of the court.

**7. Stipulation as to Time.**

The times herein provided for may be shortened or extended by stipulation of parties or order of court, or a justice thereof.

## APPENDIX B.

**Opinion of the Supreme Court of the State of Nevada.**

In the Supreme Court of the State of Nevada. No. 3981.

[Filed November 30, 1956]

Sol Gershenhorn and D. H. Caplow, Appellants, v. Walter R. Stutz Enterprises, a Limited Partnership, Walter R. Stutz and Louis Stutz, Respondents. No. 3981.

Appeal from judgment of Eighth Judicial District Court, Clark County; Harry M. Watson, Judge of Seventh Judicial District, presiding.

Modified, and affirmed as modified.

Harry E. Claiborne, of Las Vegas, and Alvin Gershenson, of Chicago, Illinois, for Appellants.

Morse, Graves & Compton, of Las Vegas, and W. Bruce Beckley, of Las Vegas, for Respondents.

By the Court, BADT, J.:

In this action, by a landlord for a declaration of the rights of the parties under a lease and option, for a cancellation of the lease, restitution of the premises and damages, the main questions presented on this appeal are as follows: (1) Is there substantial evidence to support the trial court's findings that the building, which the lessors agreed to construct, was substantially completed and ready for occupancy in accordance with the agreement of the parties; that the lessees entered into occupancy thereof and that the lessees were in default in the performance of numerous covenants of the lease? (2) Was "substantial compliance" by the lessors sufficient to entitle them to relief or were certain covenants on their part to be performed such conditions precedent as to require an exact

and complete performance? (3) Was the option to purchase, contained in the lease, such an independent, separate and severable contract as to entitle the lessees to exercise such option despite their default in payment of rents and in the performance of other covenants of the lease? (4) Did the lessees effectively exercise their option to purchase in accordance with the terms of the lease? (5) Was there a fatal misjoinder of parties plaintiff? (6) Was there a fatal non-joinder of parties defendant? (7) Was there a fatal variance between the pleadings and the proof? (8) Is there support in the record for the items of damage found by the court in the respective sums of $100,000 past-due rentals, $75,000 excess costs of the structure under the terms of the contract, and particularly $50,000 damages reflecting the finding of fact that the lessors were compelled to defend at their own cost numerous lien foreclosure actions for labor and materials for which the lessees were responsible under the lease? Our disposition of some of these questions will eliminate the necessity for any extensive treatment of others. Some additional incidental points are also involved. In the following statement of facts we shall, for the most part, refer to the plaintiffs and respondents as the lessors and the defendants and appellants as the lessees.

Appellant Caplow, by assignment, replaced one O'Connor as one of the original lessees. On February 12, 1954, the lessors leased to the lessees certain real property in Clark County, Nevada, described by metes and bounds, for which the lessees agreed to pay $5,000 a month rent for five years "beginning when the premises and building being constructed by lessors for lessees is completed, ready and approved for occupancy." The lessors represented that the zoning and other classification of the premises permitted the "erection, construction and operation of a

building and appurtenances which shall be used for legal gambling and other incidental purposes in accordance with the laws of the State of Nevada." The size of the building was agreed upon and its use described as for cocktail lounge, coffee shop, gambling casino and incidental purposes, with road approaches, driveways, parking facilities and landscaping to the satisfaction of the lessees, as well as facilities for sewage disposal, water, electrical and other utilities and facilities. The lessors were not required to furnish the air conditioning, heating or ventilating units, trade fixtures or outdoor neon signs, but were to provide the necessary outlets and openings therefor. The lessors agreed not to permit mechanics' liens to be filed against the premises and to pay promptly for all labor and materials. The lease provided further: "The lessors agree that all improvements, installations and repairs made by them shall be approved in respect to inflammability and safety to the public before the premises are open to the public by some person granted authority to do so by the County of Clark, State of Nevada, and if there is no such authorized person, then by a person or agency qualified to do so by reason of experience in fire protection." The lease further provided that in default of payment of rent for 30 days or the breach of any other covenant for 60 days after notice, the lessors might cancel and terminate the lease and reenter. The lease provided further: "Lessees agree that if a valid execution or other process be levied upon the interest of the lessees or shall not be cured, removed or satisfied within 90 days * * *," the lessors should have the right to cancel the lease and reenter. A successful action by the lessors against the lessees would entitle the lessors to a judgment for attorney fees as part of the costs. There was a corresponding reciprocal clause for the lessees.

Paragraph 28 of the lease reads in part as follows: "Lessees * * * are hereby given the option for three years from completion of the building to be erected * * * to purchase the entire premises * * * at the price and value of $417,000 * * * plus a sum equivalent to the cost of the improvements to be erected * * * ascertained by the production of the records of the lessors * * *. Such option may be exercised by the lessees as aforesaid, by written notice to the lessors or their assigns, at any time within such 3-year period."

On May 19, 1954, an amendment to the lease was executed in which the size of the building to be constructed was increased, the date of completion extended to July 15, 1954, and the cost fixed at not more than $123,200, plus excess costs of construction not to exceed $12 per square foot. To the $5,000 monthly rental was added an additional sum of 20 per cent of the net profits of the business conducted on the premises, subject to certain reductions and conditions. This provision apparently never came into effect. It was further provided that if the business to be conducted should not commence within 6 months from completion of the building, the lease might be terminated at the option of the lessors, in which event, however, they were to reimburse the lessees for the latter's costs of furniture, fixtures, equipment, supplies etc. The amendment provided further that if the lease were assigned to a limited partnership in which the lessors should hold a 20 per cent interest, a three-year option was given to such limited partnership to purchase the premises for $750,000. This provision never became effective. The lessees agreed to lend the lessors $60,000 to assist in the construction of the premises, to be evidenced by noninterest bearing notes payable on or before five years. Of this sum $47,500 was advanced and the notes were given.

A second written amendment was executed June 12, 1954, which permitted the lessees to erect at their own costs a theater and restaurant building to be attached to the casino building. This would involve no further rentals and would add no additional amount to the option price.

Date for completion of construction and delivery of possession was extended to September 10, 1954. On or about that date a notice of completion of construction was filed and the lessors served the lessees with a written notice thereof, and with notice of the additional construction costs subject to the limitations of the contract, computed according to figures submitted to be the sum of $65,163.32, payment of which sum was demanded.

The original complaint in the action filed December 4, 1954, alleged accrual of rentals from September 10, 1954, to date, and two supplemental complaints alleged the further accrual of rentals, default in payment and default in the obligation to commence business within six months, in addition to default in payment of construction costs, discharge of liens, etc.

The lessees and defendants, Caplow and Gershenhorn, appellants herein, answered separately, denied the material allegations of the complaint, alleged default of the lessors in not completing the building, alleged conspiracy and fraud to deprive the lessees of the building and counterclaimed for damages in the sum of $547,500, plus $200,000 additional damages for failing to carry out an oral agreement for the acquisition and assignment of a lease on certain neighboring premises. Further pleadings put all of these matters at issue.

The case was tried to the court without a jury and after submission on briefs, it appears that the court filed

a written decision, into which the learned trial judge incorporated findings of fact and conclusions of law drawn by him. In these findings the court found that the structure was substantially completed and ready for occupancy as of September 10, 1954, and that any delay was the result of numerous changes of plans by the lessees; that notice of completion was given and that the lessees entered into possession September 10, 1954, and that no part of the $5,000 monthly rentals have been paid; that the lessees failed to pay the excess costs; that they failed to advance $12,500 of their agreed $60,000 loan; that they failed to commence business within six months after completion or at all; that they failed to keep the premises clear of mechanics' and materialmen's liens; that the lessors were compelled, to their damage, to defend numerous lien foreclosure actions; that the lessors had received from the lessees $47,500 of the agreed $60,000 loan and had signed notes for the sums received; that excess costs of the structure, payable by the lessees under their agreement, had actually been paid by the lessors in the sum of $75,220, subject to certain credits; that the lessees were in default under the lease agreement at the time they attempted to exercise the purported option; that, except as specifically found, the allegations and denials of the counterclaim were untrue.

As conclusions of law the court found the lessors, respondents herein, entitled to judgment for $100,000 past-due rentals, $75,000 excess costs of the structure under the agreement, $50,000 damages, subject to credit of $47,-500 for advances on the notes, and entitled to the surrender and cancellation of the $47,500 notes; plus the plaintiffs' costs including an attorney fee in the sum of $10,-000.

These conclusions of law were written into a formal judgment except that the item of $50,000 damages, less credit of the sums advanced on the notes, was written as a judgment for $2500 damages, plus the surrender and cancellation of the notes. The judgment also ordered cancellation of all of the agreements and that a writ of restitution issue.

(1) The main assignment of error by appellants is that the evidence does not support the court's findings of fact. They repeatedly call attention to the frank statements of respondents that a number of items of construction required completion. The record, however, is replete with the testimony of the respondents and their witnesses amply sustaining the trial court's view that such items (except as to certain trivial matters) were entirely the responsibility of appellants. It will be recalled that the second amendment to the lease permitted the appellant lessees, at their own cost, to build a theater cafe. This required substantial revision of the casino building itself. The kitchen was increased to about double size, which in turn necessitated the opening up of the plumbing. New openings in the walls had to be constructed, present openings had to be closed. The bar was moved to the opposite side of the building. The electrical plans were drastically changed. The spot lights, the projection room, the stage lighting, etc., required a large power substation to take care of the two buildings. The original power plans were entirely inadequate to the added load. It was items such as these and numerous others that had not been completed. There was ample testimony, which the court apparently decided was credible, to the effect that lessees had agreed to defray the costs of all such items. Other changes in plans made by the lessees were the cause of the delaying of the completion date from June to July and

eventually to September 10, 1954. To consider in detail the five large volumes of record and the many exhibits would prolong this opinion without necessity or purpose. Many of the contentions of respondents are not disputed, many of them are the subject of much conflicting testimony. Under such condition of the record we shall not disturb the finding. Friendly v. Larsen, 62 Nev. 135, 144 P. 2d 747. The same thing applies to substantiation of the default of the lessees in the performance of their covenants. Not any of the $5,000 monthly rentals had been paid. The lessees had not opened for business within six months after completion. Accounts submitted by the lessors showed that the lessees, after being credited with all payments made by them, had not paid the construction costs as agreed. They had failed to obtain the necessary gambling licenses from the Nevada Tax Commission, Stats. 1953, 439, to authorize them to open up their gambling casino. They had not completed the construction of the theater restaurant.

(2) Pointing to a number of unfinished details and pointing particularly to the alleged failure of the lessors to obtain from the county authorities certain certificates of occupancy, appellants contend that the theory of substantial compliance does not apply, but that the performance of these covenants is a condition precedent to plaintiffs' right of recovery. They refer particularly to the covenant that rental was to begin under the lease "when the premises and building being constructed by lessor for lessees is completed and ready for occupancy"; that "the lessors agree that all improvements, installations and repair made by them shall be approved in respect to inflammability and safety to the public before the premises are open to the public by some person granted authority to do

so by the County of Clark, State of Nevada, and if there is no such authorized person, then by a person or agency qualified to do so by reason of experience in fire protection"; that under the uniform building code of Clark County no building or structure may be occupied without a certificate of occupancy issued by a building official; that it was admitted that even after September 10, 1954, the electrical and plumbing inspector certified: "1. The substation is not completed. 2. The electric in building is not completed. 3. The plumbing in building is not completed. 4. The kitchen is not completed. 5. The dining room and theater is not completed in any detail." It may be noted in response to this contention, however, that each of these items was the obligation of the lessees and was not the obligation of the lessors. Many pages of testimony and numerous exhibits were devoted to these items and we cannot substitute our own judgment for that of the learned trial judge as to the weight to be given to this evidence. The official building inspectors testified that as of September 10, 1954, they would have recommended the issuance of a certificate of occupancy if the lessees had completed their changes in the kitchen and electrical system. The architect on the project likewise testified that on that date the building was substantially completed and he would give an architect's certificate of completion. Delay or failure in obtaining such certificate can hardly be urged by the lessees when such delay or failure was the result in turn of the failure of the lessees to complete the very items which fell under their own responsibility. There was ample support for the court's finding of substantial compliance and for its conclusion that substantial compliance was all that was required. Sharp v. Twin Lakes Corporation, 71 Nev. 162, 283 P. 2d 611.

Respondents point out that even assuming a failure of completion of the building, such failure was waived because the lessees went into possession and thereby became liable for the rent. Anno. 28 A. L. R. 2d 458. They point out that the keys were delivered to appellants, who thereupon began installation of fixtures, bars, carpets, booths, stage curtain, stools, slot machines and gambling equipment; that they opened their offices on the second floor, installed a telephone, employed an operator, publicity men, etc., and carried on all operations available to them prior to opening. However, in view of our holding that there was ample support of the court's findings of substantial completion, it becomes unnecessary for us to pass on the question of waiver.

(3) Appellants assert that they exercised their option to purchase; that it was an independent, separate and severable contract not dependent upon the lessees' performance of the covenants of the lease; that upon such exercise the rentals ceased, as the contract then became one of seller and buyer and no longer one of lessor and lessee. Under some circumstances this might be so. See Murfee v. Porter, 96 Cal. App. 2d 9, 214 P. 2d 543. Here the lease and option to purchase both rested upon a common and indivisible consideration. This consideration was the performance by the lessees of the covenants of their lease, foremost of which was the payment of rent. As the lessees were in default in payment of rent and as the lessors gave notice of cancellation by reason thereof and as such cancellation was in accordance with the terms thereof, the lease was thereby terminated, and, the lease being terminated, the right to exercise the option ceased. Estfan v. Hawks, 166 Kans. 712, 204 P. 2d 780, 10 A. L. R. 2d 877.

(4) For a further equally impelling reason the purported exercise of the option to purchase cannot prevail. It will be recalled that the action was commenced December 4, 1954, alleging completion of the building September 10, 1954. The defendants answered on March 15 and March 17, respectively, putting in issue all of the matters hereinabove discussed with reference to the completion of the building. On March 21, 1955, after such issues had been framed, and six months after plaintiffs claimed completion and delivery of the premises, Caplow, one of the lessees, handed to the lessors a letter comprising some 1300 or 1400 words stating: "This is to advise that as lessee under the lease dated February 12, 1954, I have elected to exercise the option to purchase the premises and property containing all buildings and appurtenances described as: [description] in accordance with paragraph 28 of said lease at the price of $417,000 plus a sum equivalent to the cost of the improvements erected by lessors upon said premises; that is, the casino building and appurtenances, and in connection with the exercise of said option, I call your attention to the following matters." The letter then listed under separate captions carpentry work, electrical work, plumbing, painting, insulation, staining of roof, lanscaping, etc. It then refers to sundry paragraphs of the lease requiring the improvements to be made in accordance with applicable city, county and state laws, ordinances, codes, regulations, etc., and alleges the failure of the lessor to procure certificates of occupancy from the building commission, the fire department, the health department, etc. Demand was made for the completion of said building in all of the respects mentioned. The letter analyzed and defined the provisions of the lease, demanded a preliminary title report, outlined the matters to be contained therein, and called attention to the cove-

nant of the lessors not to permit mechanics' liens to be filed, etc. Attention was then called to the provision of the lease that rental was to begin only upon completion of the building and was to cease on exercise of option to purchase. Reference was then made in the letter to certain credits against the option price of $417,000 and concludes: "We have arranged for deposit of the option price with Tannen Investment Company, 139 South Beverly Drive, Beverly Hills, California, and will be prepared to deposit the option price in an escrow company to be mutually agreed upon, located in Las Vegas, Nevada, or in California."

Thus the so-called election to purchase put in issue the very matters already in issue under the pleadings in the pending suit in the district court. It is hardly conceivable that these issues could be tried out in any other tribunal while such suit was pending. The letter was handed to the lessors in the midst of one of the proceedings of that very action, namely, during the taking of a deposition. It was by its very terms contingent upon the determination of the issues already raised in the pending suit. The statement that the lessees *"will be prepared to deposit* the option price in an escrow company" cannot be considered otherwise than as being tied in to the contentions of the lessee Caplow that no rentals were due from September 10, 1954, to March 21, 1955; that no rentals would accrue after March 21, 1955; that the option price would be reduced to the extent of all liens filed against the property and to the extent of large sums of money as damages resulting from alleged breaches on the part of the lessors and to the extent of an estimated $50,000 required to complete the building. These were all contested matters, and the notice by lessee Caplow to the effect that "I have

elected to exercise the option" and that "we will be prepared to deposit the option price" under the conditions mentioned and particularly in view of the finding of the court that lessors had substantially completed the building and had delivered the premises on September 10, 1954, cannot in law be considered an exercise of the option.

Judge WILLIAM E. ORR, a former chief justice of this court, writing the opinion for the Court of Appeals of the Ninth Circuit in United States v. Corder, 208 F. 2d 411, cites Estfan v. Hawks, *supra*, with approval, but the Corder case is also direct authority for the proposition that under the conditions discussed above the so-called notice of election to exercise the option was not such an unequivocal offer as to be effective. Judge Orr notes, in the Corder case, that the government's notice "was mere notice that the Government *wished to exercise its option* (emphasis supplied) and a request that appellee advise it of the lowest price appellee would accept for the property. * * * the Government never made an unconditional offer to pay $75,000.00 for the property. It at all times insisted that it had the right to deduct the alleged overpayment of three days rent. As a result of the failure to exercise the option in accordance with its terms no bilateral contract for the purchase of the property came into existence. To exercise an option the notice thereof 'must be unconditional and in exact accord with the terms of the option.' (Citing authorities.) The Government was at no time bound by its conditional acceptance of the option and appellee was not bound because the option had not been exercised." The language used above is particularly applicable here where appellants at no time unequivocally offered to purchase the property in accordance with the terms of the option. They simply notified the lessors that

they would "be prepared to deposit the option price" with the escrow company, upon compliance by respondents with many disputed conditions, some of which respondents contended they had substantially performed and some of which they contended it was the duty of appellants to perform. No bilateral contract came into existence. Assuming an offer by lessors (the granting of an option to purchase) there was no acceptance by the lessees. The purported acceptance was subject to many conditions which, as noted, were already in issue in the pending suit.

(5) Appellants assert that there was a misjoinder of parties plaintiff, relying upon certain sections of Nevada Compiled Laws, which have been superseded by N. R. C. P. They also refer to authorities based upon the former practice. Plaintiffs named in the complaint were "Walter R. Stutz Enterprises, a limited partnership, Walter R. Stutz and Louis Stutz." Appellants assert that all of the exhibits and the testimony of plaintiff Walter R. Stutz show that the only proper party plaintiff was Walter R. Stutz Enterprises, a limited partnership, and that neither Walter R. Stutz, individually, nor Louis Stutz, individually, was shown to have any interest entitling him to be joined as plaintiff. Rule 21 N. R. C. P. is now applicable to the alleged misjoinder. It reads: "Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. * * *" The record does not disclose any motion in the premises in the trial court. The question is raised here for the first time. It is not shown how the asserted misjoinder was prejudicial. The assignment is without merit. Meyercheck v. Givens, 180 F. 2d 221.

(6) Appellants contend that there was a nonjoinder of essential parties defendant. While a motion to join additional parties defendant was made in the trial court, this motion was withdrawn when the plaintiffs called the court's attention to their attempts to obtain through depositions of the named defendants the names of other parties who might be interested with them in the enterprise described, and the consistent refusal of such named defendants to divulge the names of any persons who might be so interested. The separate counsel for defendant Gershenhorn and for defendant Caplow conceded in open court that plaintiffs' point was well taken, and the court denied the motion. Appellants do not deny that such was the situation, but appear now to contend that their waiver could not bind other parties and that the court should have joined them of its own motion. No argument is advanced in support of this contention, nor do appellants attempt to point out any prejudice resulting either to the named defendants or to the other persons purportedly interested with them in the enterprise. The cases cited by appellants in support of the assignment are not in point, and we find no merit in the assignment.

(7) Appellants next assert that there was a fatal variance between the pleadings and the proof with reference to that part of the judgment ordering a cancellation of the $47,500 five-year noninterest bearing notes given the lessees by the lessors in evidence of moneys advanced by the lessees to assist in the construction by the lessors. Appellants say that these notes were not described in the complaint. However, the lease attached to the complaint as an exhibit and expressly made a part thereof required the notes to be given and the complaint alleged that of the required $60,000 loan required by the specific provision of

the lease, $47,500 had been advanced but that there had been a default in the advance of $12,500. Defendants in their pleadings alleged their advance of $47,500 as a loan in accordance with the terms of the lease, defendants Caplow and Gershenhorn both testified to the making of the loan, and the matter of the notes was the subject of considerable examination, in which the court itself joined. Accordingly, (a) the question of the notes was sufficiently raised by the pleadings; and (b) the issue of the right to a cancellation of the notes was tried before the court by consent of the parties and must in any event be treated in all respects as if it had been raised in the pleadings. Rule 15(b) N. R. C. P. Nor does the lack of an amendment in the premises affect the validity of the judgment. See Moore's Federal Practice, sec. 15.13, commenting on this rule. See also Barron and Holtzoff, Federal Practice and Procedure, sec. 449. The assignment is without merit. We have thus concluded that there is no merit in any of the assignments 1 to 7, inclusive. The next assignment, however, presents more difficulty.

(8) We have noted that, in addition to adjudging a cancellation of the contract and awarding restitution of the premises, the court rendered judgment against the lessees for $100,000 past-due rentals, $75,000 excess costs of the structure under the terms of the contract, $10,000 attorney fees and $50,000 additional damage. The $100,000 rental is based upon the agreed $5,000 per month for twenty months. The item of $75,000 for excess construction costs was arrived at by the court from oral and documentary evidence supporting these costs in a considerably larger sum but limited by the provisions of the lease to $12 per square foot, and finds ample substantiation in the record. The $10,000 attorney fee was allowed under the provisions of the lease.

The judgment for $50,000 damages, however, apparently is based upon finding of fact No. 7, which reads in full as follows: "7. That defendants failed to keep the premises clear of mechanics' or materialmen's liens, neither did they contest the same, nor did they satisfy process levied against lessees' interest within ninety days or at all. That plaintiffs have been damaged *in that they had to defend at their own cost and expense numerous actions against liens and process in which defendants here were named therein as defendants.*" (Emphasis supplied.) Such finding patently does not of itself support a judgment for $50,000. If it does, it might as well be said that it supports a judgment on such item for several times that amount. The record does indeed contain much evidence concerning the filing of liens against the premises by reason of labor and materials ordered by the lessees and for whose costs they were responsible. The record further discloses the commencement of suits to foreclose such liens asserted against the property of the lessors and in which suits the lessors were named as defendants. Restitution of the entire premises benefiting by the work and labor involved in the lien suits was made to the lessors, and this included not only the casino building constructed by them but the theater-restaurant building constructed (subject to certain required completion) by the lessees. It is not indicated either by the court in its findings, conclusions and judgment or in the briefs of the respondents that the lessors were not made completely whole as a result of the judgment. Accordingly, the $50,000 judgment and the finding on which it is based must look for support to evidence as to costs, expenses and attorney fees incurred by the lessors in their defense of the said lien foreclosure suits. As the briefs of the parties made no attempt to deal with this item we had the clerk instruct counsel for

respondents to point out any parts of the record supporting any damage by reason of costs and expenses incurred by respondents in defending against the sundry lien foreclosures. Respondents replied by listing the lien foreclosure suits filed, with the expressed conclusion that this "amply supports the sum of $50,000 allowed as damages." Of course, it does nothing of the kind. Appellants properly point out in their response to respondent's letter "that there is no basis for the judgment of $50,000." We are satisfied that the judgment must be modified by striking this item.

Other questions "lurk in the record" which have caused the court some concern but which have not been properly presented for determination. Indeed, by reason of our desire to do justice to the parties and because of the very substantial amounts involved, we have gone to considerable length in attempting to define the issues presented despite obstacles and difficulties growing out of the manner of their presentation. In the first place, appellants' opening brief assigned as error variance between the pleadings and the proof, misjoinder of parties plaintiff, nonjoinder of parties defendant, failure of the plaintiffs to prove a cause of action because plaintiffs first breached the contract, insufficiency of "substantial completion," and failure of plaintiffs to comply with statutory provisions having to do with unlawful detainer actions. It will have been noted from the foregoing opinion that the court was able to dispose of these assignments without too great difficulty. Appellants' reply brief (some four times as long as their opening brief) raised for the first time the other questions above discussed. We ignored this as well as other failures to comply with our rules and went so far as to request submission of further memoranda as noted above. Orderly appellate procedure demands that at some

point we must consider the appeal finally submitted for our decision and we feel that such point has been reached in this case. We do not choose, of our own motion, to add to the assignments of error issues which to us may seem of importance but which counsel have not seen fit to present.

In concluding we find it necessary to define the manner in which our decision affects the judgment. This was in its final effect as follows:

| | |
|---|---|
| For rental | $100,000 |
| For excess costs of construction | 75,000 |
| For damages for costs of defending lien suits | 50,000 |
| Attorney fee allowed | 10,000 |
| Gross judgment | 235,000 |
| Offset allowed by reason of moneys advanced by defendants | 47,500 |
| Net judgment | $187,500 |
| Modification by this court by deducting item of | 50,000 |
| Net judgment pursuant to our modification | $137,500 |

In order to make the offset effective the trial court ordered defendants to surrender to plaintiffs the $47,500 five-year noninterest bearing notes. This order we leave undisturbed. Except as modified above, the judgment and order denying new trial are affirmed. Appellants and respondents shall pay their own respective costs in this court.

MERRILL, *C. J.*, and EATHER, *J.*, concur.

ATTEST: A full, true and correct copy.

ANNA REBOL,
*Official Reporter.*

Filed November 30, 1956.
NED A. TURNER,
*Clerk of Supreme Court.*

**Opinion of the Supreme Court of the State of Nevada.**

In the Supreme Court of the State of Nevada. No. 3981.

[Filed January 29, 1957]

Sol Gershenhorn and D. H. Caplow, Appellants, v. Walter R. Stutz Enterprises, a Limited Partnership, Walter R. Stutz and Louis Stutz, Respondents.

Rehearing petition; petition denied.

Harry E. Claiborne, of Las Vegas, and Alvin Gershenson, of Chicago, Illinois, for Appellants.

Morse, Graves & Compton, of Las Vegas, and W. Bruce Beckley, of Las Vegas, for Respondents.

PER CURIAM:

With increasing frequency counsel seem to be confusing the function of a petition for rehearing with the rehearing itself. In this case a "petition" of 34 pages has been filed by the appellants which, upon patient reading, is discovered to be in substance a reargument of the appeal. For this reason, rehearing is denied.

We deem this an appropriate occasion to point out to the members of the bar that argument upon the merits is out of place in a petition for rehearing. The petition asks leave to argue and should, therefore, confine itself to a statement of the points upon which the right to present argument and authority is sought. See "Rehearing in American Appellate Courts," 44 Cal. Law Review 627. At page 658 of the cited article it is stated (referring to the petition), "It should be brief and it should not be argumentative; it should point to the conflict created [by] or the 'controlling' matter overlooked in the original decision. It should not be expected to also serve the role of

persuading the court how the conflict or error should be resolved. That is the object of resubmission. The object of the petition is only to show that the petitioner is entitled to a rehearing, not that he is entitled to a different decision on the merits."

BADT, *C. J.*
EATHER, *J.*
MERRILL, *J.*

ATTEST: A full, true and correct copy.

ANNA REBOL,
*Official Reporter.*

Filed January 29, 1957.

NED A. TURNER,
*Clerk of Supreme Court.*

JUN 8 1957
JOHN T. FEY, Clerk

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1956

**No. 990**

SOL GERSHENHORN and D. H. CAPLOW,
*Petitioners,*

vs.

WALTER R. STUTZ ENTERPRISES, a limited partnership, WALTER R. STUTZ and LOUIS STUTZ,
*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada.**

## BRIEF FOR RESPONDENTS IN OPPOSITION.

W. BRUCE BECKLEY,
WILLIAM R. MORSE,
25 Fremont Street, Las Vegas, Nevada,
*Counsel for Respondents.*

PARKER-WALKER PRINTING CO., SAN FRANCISCO, CALIFORNIA

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# In the Supreme Court
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SOL GERSHENHORN and D. H. CAPLOW,
*Petitioners,*

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*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada.**

## BRIEF FOR RESPONDENTS IN OPPOSITION.

### STATEMENT.

The following additional Statement is believed necessary for an understanding of both Petitioners' Statement and this entire proceeding.

The action in the trial court was commenced by Respondents and involved a written lease of real prop-

erty by Respondents to Petitioners, which lease was attached to and made a part of the complaint (R.Vol. I, 8-35).[1]

Under the lease, Respondents were to construct and complete a building for Petitioners and, upon completion, rental was to commence (R.Vol.I, pps.21-22). Respondents began construction of the required building, but before it was completed, an amendment to the lease (R.Vol.I, 34-5) gave Petitioners the right to construct an additional and adjoining building.

The lease, as amended, contained normal provisions for concellation for breach and non-payment of rent (¶7; R.Vol.I, 26-27) and a special provision for termination in the event Petitioners failed to open for business within 6 months after completion of the building to be constructed by Respondents (¶3; R.Vol.I, 23-24).[2]

The trial court found that Respondents completed the required building on September 10, 1954 and that thereafter Petitioners accepted and occupied the premises (¶2, 3; R.Vol.II, 251); but Petitioners never

---

[1]The Record on Appeal is referred to as R, followed by the Volume and page number.

[2]A word should here be said relative to Petitioners' contention (Petition, p. 9) that since the lease contained a provision (¶3; R. Vol.I, 23-24) requiring Respondents to reimburse Petitioners for certain improvements if Petitioners exercised their option to terminate for failure to open for business within six months of completion of the building, the court's failure to require such compensation was a violation of due process. The simple answer is that Petitioners were found to have defaulted in other matters, including failure to pay rent, the breach of which did not require such compensation (¶7; R.Vol.I, 26-27).

opened for business (¶6; R.Vol.II, 252) and have never paid any rent (¶3; R.Vol.II, 251).

The trial court gave judgment to Respondents for damages, restoring the premises to Respondents (R. Vol.II, 254-256), which judgment was affirmed by the appellate court, except as to one item of damages (Petition, Appendix B, pps.18-20). The trial court also, as an offset against the damages, ordered the cancellation of certain promissory notes given by Respondents to Petitioners for a loan made by Petitioners to assist Respondents in constructing the building (R.Vol.II, 253; lines 13-16).

Petitioners' Statement raises a question of the constitutionality of Rule XI of the Supreme Court of the State of Nevada and seems also to generally and vaguely complain with regard to some "forfeiture" (Petition, p.2). But whether Petitioners' complaint is directed to the cancellation of the notes, the restitution of the premises or the cancellation of the argeements is never made clear.

---

## ARGUMENT.

### RULE XI OF THE SUPREME COURT OF THE STATE OF NEVADA.

This rule, set forth in full in Appendix A of the Petition, contains two requirements:

(a) Oral argument on appeals is limited to one hour; and

(b) Errors assigned, but not briefed or orally argued, are waived.

Petitioners attack each provision as being in violation of the due process clause of Article XIV of the U. S. Constitution.

With regard to the one hour limitation for oral argument, Petitioners cite no authority for their position, whatsoever. Indeed, the authority is just to the contrary. As stated by this Court in the case of *McDonald v. Pless,* 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300, 1302,

> ". . . In the very nature of things the courts of each jurisdiction must each be in a position to adopt and enforce their own self-preserving rules (citing cases)."

Respondents submit that such a time limitation is the exercise of nothing more than this inherent power of any court to regulate the orderly disposition of its business. It would seem to be obvious that any court would necessarily have to make some reasonable limitation upon oral argument; and a limitation of one hour for such purpose is not only reasonable but necessary and proper.

Indeed, this Court, under its own rules, has applied the identical one hour limitation (Rule 44 [4]); and each of the U.S. Courts of Appeals have adopted a period of the same or lesser duration. For example, the Courts of Appeals for the First, Fourth and Eighth circuits have adopted the one hour limitation, those for the District of Columbia, Second, Third, Sixth, Seventh, Ninth and Tenth circuits have adopted a 45 minute limitation, and that for the Fifth Circuit has adopted a 30 minute limitation.

Respondents submit that, in view of the uniformly similar limitation imposed by all of the appellate courts of the United States, such a limitation by the Supreme Court of the State of Nevada is both reasonable and constitutional.

Passing to the second phase of the attack on Rule XI, that errors assigned, but not briefed or argued, are waived, we need only note that this is the universal rule, adopted in this and all other courts. As illustrative of this rule, it is noted that *Federal Digest, Vol. 5, Appeal & Error,* § 1078(1) lists some 70 federal cases, including *Eastman Kodak Co. of New York v. Southern Photo Materials,* 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684, and *Whiting v. Bank of U.S.,* 38 U.S. 6, 13 Pet. 6, 10 L.Ed. 33, under the heading:

> "Assignments of error, not briefed or argued, must be deemed abandoned and will not be considered."

It should also be noted that Petitioners never set forth the points which they believe were not considered by the appellate court. They note only that, in its decision, the court acknowledged that "Other questions 'lurk in the record' . . . *but which have not been properly presented for determination.*" But at no place in the Petition do Petitioners set forth what these questions were.

In considering Petitioners' contention, it is of importance that the rule provides that only errors which were *neither briefed or argued* are waived. Much of Petitioners' argument actually presents the contention that the mere lack of time in oral argument was

prejudicial, ignoring the fact that, previous to the argument, they had filed briefs, one of 11 pages and one of 36 pages. Thus, anything presented in either of these briefs *or* in the hour-long argument was clearly not waived under the rule. And since Petitioners specifically concede that "It must be assumed therefore, that, appellants did touch upon these errors in citing their points and authorities . . ." it is clear that the rule of which they complain was never applied against them.

The real answer to Petitioners' entire argument is that, although they repeated, time and time again, in their Petition and Motion for Rehearing, filed in the court below, and repeat in their Petition to this Court that their substantial rights were affected by the limitations imposed, *nowhere do they state what those rights were or what points they allegedly were prevented from presenting or from having considered by the court and which would have resulted in a different decision.* Candor compels the observation that, now having still another opportunity to bring such points to light, Petitioners should at least specifically refer to and identify these all important points and show how they would have necessitated a reversal of the trial court's judgment.

One further word should also be said with regard to Petitioners' allegation that they could "not conceive that the Court would compel the argument of two matters [the motion to dismiss and the case on the merits] within the space normally allotted for one."

In the first place, there existed no right or rule under which Petitioners had any time whatsoever to argue the motion to dismiss. (Indeed, in many courts, including the Courts of Appeals for the District of Columbia, the First, Sixth, Seventh and Eighth circuits, no time at all is allowed for oral argument of such motions). But Petitioners' contention that they could not conceive of the court requiring the argument of both matters in one hour is belied by the Reporter's Transcript of the oral argument in the appellate court where, after using some 55 minutes of his allotted time, Petitioners' counsel himself *anticipated that he had but one hour* by asking permission for further time. It does not seem consistent for him to have asked for further time 5 minutes before the period expired if he was not completely aware of the limitation.

In the last analysis, if Petitioners were prejudiced they were afforded an opportunity, in their Petition and Motion for a Rehearing, to set forth clearly and at any length they desired, the points which they allegedly had been prevented from submitting in their briefs and oral argument. Instead, as stated by the appellate court, a petition of 34 pages was "filed by the appellants which, upon patient reading, *is discovered to be in substance a reargument* of the appeal. For *this* reason, rehearing is denied." (Petition, Appendix B, 22).

We submit that not only did Petitioners fail to present the points which they allege to have been ignored, but such points do not, as shown by the record, exist.

## AFFIRMATIVE REASONS FOR DENYING THE WRIT OF CERTIORARI.

As further, additional and affirmative grounds for opposing the grant of the writ, Respondents submit the following:

1. Petitioners are presently in contempt of the trial court for failure to comply with the judgment and orders of the trial court herein; and there exists an outstanding order of arrest of Petitioners for failure to comply with said judgment and orders.

2. The issues have become moot by virtue of the sale of the Petitioners' entire interest in the property in controversy by virtue of execution in an independent proceeding.

These matters are felt to require no great discussion or citation of authority.

The order of contempt of arrest of Petitioners is contained in the record (———) and shows that Petitioners have wholly ignored the judgment and orders of the trial court. They can hardly be said to be in a position to ask the aid of any court while remaining in contempt of valid and existing orders in the same action. Indeed, this Court has approved the dismissal of an appeal (a right given by statute) in a state court where appellants were in contempt of orders of the court. *National Union of Marine Cooks and Stewards v. Arnold,* 348 U.S. 37, 75 S.Ct. 92, 99 L.Ed. 46. The reasons therein set out for the dismissal of a statutory appeal more than support a refusal to grant certiorari, the granting of which is only discretionary.

As to the second affirmative matter, Respondents have attached hereto as an Appendix an exemplified copy of a Return of Sale of Real Estate made in an independent action,[3] showing that the interest of Petitioners, and each of them, in and to the real property, covered by the lease which is the subject matter of this action, has been sold under an execution sale by the sheriff. It is thus clear that since Petitioners no longer have any interest in or to said property, the entire matter has become moot. In such a case, as stated by this Court, in vacating the writ of certiorari in the case of *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America etc. v. Wisconsin Employment Relations Board et al.*, 340 U.S. 416, 71 S.Ct. 373, 95 L.Ed. 389, 391:

> "... There being no subject matter on which the judgment can operate, the cause is moot.
>
> "...'A federal court is without power to decide moot questions or to give advisory opinions which cannot effect the rights of the litigants in the case before it.'"

We thus submit that, entirely aside from the lack of merit of the Petition, the writ should not be granted because the case has become moot and because Petitioners are presently in contempt of the orders of the trial court.

---

[3] *Stine v. Woods et al.*, Case No. 70385, and *Bell et al. v. Cendali et al.*, Case No. 73347, in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

## CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated, Las Vegas, Nevada,
June 5, 1957.

W. BRUCE BECKLEY,
WILLIAM R. MORSE,
*Counsel for Respondents.*

**(Appendix Follows.)**

Filed April 5, 4:43 P.M. '57. Helen Scott Reed, Clerk.

*In the Eighth Judicial District Court*
*of the State of Nevada*
*in and for the County of Clark*

Case No. 70385-73347 Dept. No. 3

William K. Stine, doing business as A-1 Plumbing Supply,
Plaintiff,

vs.

Lillian N. Woods, Harry Berner, Desert Spa Casino, Sol Gershenhorn, David H. Caplow, Fred Weichman, Charles Marems, Walter R. Stutz Enterprises, Paul McDonald, Jack Roson, Abe Toberoff, B. B. Lennon, Fred J. Trevilliam, Walter R. Stutz, Louis Stutz, Samuel N. Stutz, Amos Cindelli, also known as Amos Cendali, Paul T. Agsten, George B. Goldenberg, Nate Rosenberg, Bernice Gantert, Lillian Hiest and William J. O'Connor, and Hyman Freidnash,
Defendants.

Case No. 70385
Dept. No. 3

Consolidated With:

Harry W. Bell, H. M. Bell, and Anna Mackay, Executrix of the Estate of Sterling Mackay, Deceased,
Plaintiffs,

vs.

Amos Cendali and Walter Stutz,
Defendants.

Case No. 73347
Dept. No. 3

## RETURN OF SALE OF REAL ESTATE

Office of the Sheriff of the County of Clark,
State of Nevada.—ss

I, W. E. Leypoldt, sheriff of the County of Clark, State of Nevada, do hereby certify:

That by virtue and in pursuance of the annexed execution (order of sale), I advertised the interest of David H. Caplow and Sol Gershenhorn, and each of them, in the property described in said execution, located in the County of Clark, State of Nevada, described as follows:

> The front portion of the property hereinafter described, being approximately 300 frontage on U.S. Highway 91 and running back from said Highway to a line 50 feet in front of and parallel with the existing motel building known as the Desert Spa Motel, of a portion of the South Half (S ½) of Section 9, Township 21 South, Range 61 East, M.D.B. & M., more particularly described as follows:
>
> COMMENCING at the intersection of the East line of U. S. Highway No. 91 as it now exist., with the North line of the South Half (S ½) of the Southeast Quarter (SE ¼) of the Southwest Quarter (SW ¼) of said Section 9; thence North 28°00′ East along the East line of said U. S. Highway 91, a distance of 300 feet to a point; thence South 89°25′ East a distance of 1000 feet to a point; thence South 28°00′ West a distance of 300 feet to a point on the North line of the South Half (S ½) of the Southwest Quarter (SW ¼) of the Southeast Quarter (SE ¼) of said Section 9; thence North 89°25′ West to the North-

east corner of the parcel of land conveyed by Val E. Sneed by Deed to Harry Mack and others recorded July 31, 1944, in Book 35, page 492 of Deeds; thence West along the North line of said parcel conveyed to Harry Mack and others to the East line of U. S. Highway 91 being the point of beginning,

to be sold by me at the Second Street Entrance to the Courthouse, City of Las Vegas, County of Clark, State of Nevada, on the 29th day of March, 1957, at 2:00 o'clock P.M.; that previous to said sale, I caused due and legal notice thereof to be posted in three public places in the township where said property is situated and where said property was sold for a period of twenty (20) days, successively, and to be published once a week for the same period in a newspaper, the Las Vegas Review Journal, a daily newspaper published in the City of Las Vegas, County of Clark, State of Nevada; and that on the 29th day of March, 1957, the day on which said property was so advertised to be sold, as aforesaid, I attended at the time and place fixed for said sale, and exposed the said property for sale in one parcel, at public auction, according to law, to the highest bidder for cash, lawful money of the United States, when Walter R. Stutz Enterprises, a limited co-partnership, being the highest bidder therefore, the said property was struck off by me to said Walter R. Stutz Enterprises for the sum of Fifty Thousand Dollars, lawful money of the United States, which was the whole price bid, and which I acknowledge to have received; and that I delivered to said purchaser a certificate of said

sale, and filed a duplicate thereof in the Office of the County Recorder of said County; and I have been unable, after due search and diligent inquiry, to find any other property of David H. Caplow and Sol Gershenhorn, or either of them, not exempt from execution, in said County, out of which to make the remainder of the judgment in said execution mentioned, or any part of said remainder; and I hereby return said execution satisfied only in part, namely in the sum of Fifty Thousand Dollars ($50,000.00).

After a diligent search and inquiry as required by law, I could find no personal property of David H. Caplow and Sol Gershenhorn, or either of them, whereby said execution could be satisfied in whole or in part.

March 29, 1957.

W. E. Leypoldt /s/
W. E. Leypoldt,
Sheriff of the County of
Clark, State of Nevada.

State of Nevada,
County of Clark.—ss

I, Helen Scott Reed, the duly elected, qualified and acting County Clerk of the County of Clark, State of Nevada, and ex-officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, do hereby certify and attest the foregoing to be a full, true and correct copy of the original:

Return of Sale of Real Estate, dated March 29, 1957, filed April 5, 1957, in the consolidated actions entitled, Stine v. Woods et al., Case No. 70385, Dept. No. 3, and Bell et al. v. Cendali et al., Case No. 73347, Dept. No. 3;

together with the endorsements thereon, now on file in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and annexed the Seal of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, this ____ day of June, 1957.

(Seal) Helen Scott Reed,
County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark.

State of Nevada,
County of Clark.—ss

I, Ryland G. Taylor, Judge of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, do hereby certify that Helen Scott Reed is County Clerk of the County of Clark, State of Nevada, and ex-officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark (which Court is a Court of Record having a seal); that the signature to the foregoing certificate and attestation is the genuine signature of the said Helen Scott Reed, as such officer; that the seal annexed thereto is the seal of said District Court; that said Helen Scott Reed, as such clerk, is the proper officer to execute the said certificate of attestation, and that such attestation is in due form according to the laws of the State of Nevada.

In Witness Whereof, I have hereunto set my hand in my official character as such Judge, at the City of Las Vegas, County and State aforesaid, this —— day of June, 1957.

Ryland G. Taylor
Judge of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark.

State of Nevada,
County of Clark.—ss

I, Helen Scott Reed, County Clerk of the County of Clark, State of Nevada, and ex-officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark (which Court is a Court of Record, having a seal, which is annexed hereto) do hereby certify that Ryland G. Taylor, whose name is subscribed to the foregoing certificate of due attestation was, at the time of signing the same, Judge of the District Court aforesaid, and was duly commissioned, qualified and authorized by law to execute said certificate. And I do further certify that the signature of the Judge above named to the said certificate of due attestation is genuine.

In Witness Whereof, I have hereunto set my hand and annexed the Seal of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, this ____ day of June, 1957.

(Seal) Helen Scott Reed,
County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark.